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No. 90-1059

IN THE

Supreme Court of the United States

October Term, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

v.

MEMBERS OF THE NEW YORK CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE McGRATH and ANGELO PETROMELIS

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICI

The State Florida is one of forty-two states that have enacted laws to prevent criminals from garnering large profits by marketing their crime stories.[1] Most of these statutes regulating profits—commonly referred to as "Son-of-Sam" laws—are modeled after New York's law, which requires that anyone contracting for the story of a person accused or convicted of a crime deposit the proceeds of the contract with a crime victims' compensation board.[2] The board holds the funds in escrow for five years. During that period the money may be released only for attorneys' fees and for restitution to victims of the offender's crime. After the five-year period, the offender receives any funds remaining in the account.

The Florida statute varies from the New York statute by placing a statutory lien on the proceeds of a convicted felon's account of his crime. Once the lien has been perfected, the funds are distributed to dependents of the offender, to victims of the crime and to the state for its costs in prosecuting and incarcerating the offender.[3] Florida currently has three Son-of-Sam cases pending in its trial courts.

All of the forty-two state Son-of-Sam statutes prevent the dissipation of the proceeds from the criminal's story of the crime and provide a method for distribution of the assets to the victim. These statutes not only decrease the likelihood that society will have to support victims of crime, but also satisfy victims' sense of justice and desire for retribution, and increase the criminal's awareness of the consequences of his crime.

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1 *See* Brief for Respondents at n. 16.

2 New York Executive Law § 632-a.

3 Section 944.512 Florida Statutes (1989).

These statutes are narrowly designed to provide a measure of compensation to crime victims without abridging the criminal's right to tell his story and express his thoughts and feelings about the crime. It is the commercial element, the marketing and profit motive, which is being regulated, not the speech itself. These statutes, which are consistent with the values and principles underlying our First Amendment traditions and jurisprudence, provide the states with a means of assisting the victims of crime and shifting the cost of that assistance, at least in part, from the public to the criminal offender. For this reason, Florida and other amici states support New York in its efforts to affirm the constitutionality of its statute.

SUMMARY OF ARGUMENT

The Son-of-Sam law does not directly burden free speech. Rather, it regulates the contract that permits a criminal to profit through exploitation of his crime. In those instances when a publisher deems it expedient to contract with a criminal for the right to that story, the involuntary victim, by operation of state law, becomes the third-party beneficiary. This satisfies the governmental interest in assuring that the transgressor will not be further unjustly enriched at the expense of his victim.

First Amendment rights are not abridged by the application of this statute. Pecuniary gain is only one of numerous motives for a criminal to tell his story. A criminal who chooses not to share his exploits because of the removal or postponement of economic gain is merely an unwilling speaker. Should a publisher encounter such an unwilling speaker, it has alternative sources available for gathering and disseminating the desired information. The First Amendment does not grant a publisher an unfettered right to the source of its choice, especially at the expense of involuntary victims.

ARGUMENT

THE SON-OF-SAM LAW DOES NOT UNDULY RESTRICT PETITIONER'S EXERCISE OF FIRST AMENDMENT RIGHTS

New York Executive Law § 632-a does not directly abridge free speech, but rather constrains the use and disposition of commercial profits during a fixed period of time. The law regulates the contract that permits a criminal to profit by preserving a known and identifiable asset from which a victim can receive restitution, and it preserves the claim until the creation of such an asset. The intent is not to prevent the publication of the criminal author's story, but to assure the victim's rights to the money generated by sale of the story, which often has its origin in the most heinous conduct.

Petitioner and its amici argue that most would-be story tellers will decline to speak or write without a financial incentive to relate the criminal activities. They cite as authority the majority opinion of the court below, the affidavits in the record, published accounts of crimes of hundreds of convicts, and the asserted motive of Henry Hill for supplying the information for *Wiseguy*. The fallacy in this approach is that it imputes to all individuals personal economic gain as the primary incentive to create and disseminate ideas. This "market place of ideas" rationale for freedom of expression is but one of several philosophical rationales for the First Amendment. Others are individual self-fulfillment, attainment of truth, participation in decision making, and maintenance of a balance between stability and change in society.[4] None of these functions is unduly burdened by the Son-of-Sam law.

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4 *See Emerson*, Towards a General Theory of the First Amendment, 72 Yale LJ 877, 881-82 (1963).

State and local laws have historically provided the machinery specifically designed to balance larger societal interests with different, and sometimes clashing, interests of individuals in freedom of expression. While a democratic government may not seek to promote the broad interest in consensus by means of restrictions on expression, it may control conduct other than expression. *See Ward v. Rock Against Racism*, ____ U.S. ____, 109 S.Ct. 2746 (1989). So too may state law inculcate and enforce community standards of right and wrong. *See In the Matter of Children of Bedford, Inc. v. Petromelis*, ____ N.Y. 2d ____ (1991) (upholding New York Executive Law § 632-a). It is within this context that the Son-of-Sam law should be viewed.

The New York statute seeks to provide recovery to victims and to prevent the offender from deriving profit from his crime and the injuries which he has inflicted. The statute thus escrows the proceeds from the story of the crime, not to suppress the contents of the speech, but to ensure the victim's recovery of at least some small measure of damages. The statute balances the right of freedom to express views and ideas with the state's interest in compensating crime victims. If the criminal author receives no money for his efforts, there is nothing to distribute to the victims. If he is paid for his story, the victim raises his claims to the escrowed funds. The statute is limited to those cases in which the offender would be unjustifiably enriched as a result of the crime which generated his story. This dual purpose of providing restitution for victims and preventing unjust enrichment of criminals is a substantial governmental interest that is clearly unrelated to the suppression of any protected speech. *Cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (Constitution does not prevent state law from requiring the media to compensate a performer for broadcasting his act without his consent). If a state has the right to prevent unjust enrichment of the media resulting from the appropriation of an existing right of publicity, it

have the right to prevent the unjust enrichment of a criminal author who would exploit the fate of his involuntary victims.

Petitioner argues that statutory restrictions on expenditures for speech have the "inevitable effect of reducing the total quantum of speech," citing *Meyer v. Grant,* 486 U.S. 414, 423, (1988). Additionally, petitioner relies upon six other cases in which this Court has held that restrictions on payments for speech are direct burdens on speech that are invalid unless proven to be necessary and narrowly tailored to serve a compelling governmental interest.[5] In each of those cases involving the dissemination of charitable or political ideas, this Court found that the solicitation or dissemination itself was so characteristically intertwined with charitable or political issues that the regulation would affect the flow of such information. However, several of those cases expressly recognized a distinction when the sale of literature introduced "a commercial feature." *Breard v. Alexandria,* 341 U.S. 622, 642 (1951).

In *Breard,* a vendor challenged a regulation which banned door-to-door solicitations of national periodicals in residential areas. The regulation was upheld on the basis that the privacy interests outweighed the right to distribute magazines on private property by uninvited entry. This Court recognized that the sale of periodicals did not put them beyond the protection of the First Amendment. The sale, however, brought into the transaction "a commercial feature," *Id.* at 642, which distinction continues to be recognized as requiring a weighing of public and individual rights. *See Minneapolis Star and Tribune v. Minn. Comm'r of Rev.,* 460 U.S. 575, 585 (1983); *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 704 (1986); *Village of Schaumburg v. Citizens, etc.,* 444 U.S. 620, 631 (1979).

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5 *See* Brief for Petitioner, pgs. 17-18.

The Son-of-Sam statute has an insubstantial effect upon a criminal offender's opportunity to disseminate his ideas. Any inhibition he may feel to write or publish relates only to thwarted profit-seeking as opposed to informing or persuading the public. The Son-of-Sam statute is directed at the commercial feature of a criminal's speech about the crime—that is, the use of his notoriety derived solely from criminal activity to authenticate the work and enhance its market. Hence, while the criminal author remains free to appeal to the public's ever growing curiosity and fascination, he is not free to benefit himself by exploiting the victim whose involvement was involuntary. Any economic benefits derived from this exploitation must be made available to the victim who not only suffered when the crime was committed, but who must continue to endure constant reminders and revelations about the crime presented. By escrowing these funds, the statute prevents the criminal from being unjustly enriched at the expense of his victim, but does not affect his ability to tell his story.

Any attempt to establish a direct relationship between the removal of monetary incentives and a decrease in the number of criminals who would market their crime stories is speculative at best. The fact that Henry Hill and others may (according to petitioner's affidavits) refuse to speak to the press or enter into contracts to publish their personal accounts is merely indicative of the lack of a "willing speaker." However, "[f]reedom of speech presupposes a willing speaker." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.,* 425 U.S. 748, 456 (1976). Petitioner's attempts to ascribe the motives of a few supposedly unwilling speakers to all criminals is speculative and does not demonstrate a substantial burden upon First Amendment interests. The fact that numerous offenders would be affected by the statute does not necessarily mean they would refrain from writing or publishing, assuming they had such an interest. Petitioner's arguments do not

demonstrate a "significant constriction of the flow of news to the public," as contemplated in *Branzburg v. Hayes,* 408 U.S. 665 (1972).

Criminals, as other individuals, have motivations for speaking unrelated to pecuniary gain. Some of the earliest American literature by convicted criminals was purely confessional. The author offered himself as an example for other members of society and sought forgiveness.[6] Autobiographies of anti-slavery political prisoners attempted to use the authors' personal experiences as a means of awakening their readers to the real nature of slavery and activating them to join the struggle against it.[7] Some convicts wrote protest literature against the brutality of prisons while others used it as an opportunity to articulate a political defense of the crime committed by retrying the case in the court of public opinion.[8] Still others wrote to raise money to reopen their case.[9] While some who had been incarcerated offered a plea to the reader to do something about reforming or abolishing prisons,[10] others wrote from a revolutionary perspective.[11] In a case currently pending in Florida, a woman convicted of murdering her husband wrote a fictionalized account of the crime and stated publicly that the book was not written for monetary gain but in the hopes of establishing her innocence and finding her husband's murderer.[12] It is a facile conclusion to suggest that such works would not be

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6 Franklin, Prison Literature in America, at 127 (Oxford University Press, 1982).

7 *Id.* at 132.

8 *Id.* at 135.

9 *Id.* at 151.

10 *Id.* at 137.

11 *Id.* at 147.

12 *State of Florida v. Robinson,* case # 91-1001, Circuit Court, Fifth Judicial Circuit, Marion County. *See* article, St. Petersburg Times, March 12, 1991, page 6B.

published were the author allowed only a reduced profit or no profit.

Additionally, the Son-of-Sam statute does not impede the access to effective media for criminals who want to tell their story. Rarely, if ever, would a criminal need to rely upon contract advances to cover research and other preliminary expenses because he typically sells only his rights to the story, and not his services as author. Usually, a paid ghostwriter pens the criminal's story.[13] Some criminals are willing to share their stories for no compensation at all,[14] while others actually desire to compensate their victims.[15] Under the New York law, a criminal may enter a media contract to raise money for his criminal defense, and in Florida, the statute allows payment to the criminal's dependents. In such cases, the Son-of-Sam statutes actually encourage speech rather than deter it.

The Son-of-Sam statute protects a substantial governmental interest by providing a precise and limited method of preventing criminals from being unjustly enriched by the exploitation of their crimes and by providing a fund through which the victim or the victim's family can obtain at least partial recovery for damages incurred as a result of the criminal's activities. This regulation has no effect upon the criminal's ability to tell his story or disseminate his ideas. The New York statute allows him to use up to 20% of the escrowed funds for attorney's fees. It merely deprives him of the direct use of the proceeds in favor of his victims, whose claims are far more equitable.

Petitioner and its amici cite numerous examples of authors whose writings would have been subject to the Son-of-

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13 *Okuda,* Criminal Antiprofit Law: Some Thoughts in Favor of the Constitutionality. 76 CAL. L.R. 1353, 1365 (1989).

14 *Id.* at 1364, footnote 73.

15 *Id.* at 1364, footnote 74.

Sam statutes if they had been in effect at the time of publication. However, any suggestion that authors such as Frederick Douglas, Henry David Thoreau, or Malcolm X would not have written their autobiographies is both speculative and repugnant to the very principles they espoused. Would petitioner and its amici suggest to this Court that Dr. Martin Luther King, Jr. wrote a book about the Civil Rights movement only for personal pecuniary gain? The argument also fails to take account of the fact that many of the more noteworthy literary works cited involved victimless crimes. "If there is no victim, a necessary requirement for implementation of the statute is lacking, section 632-a does not apply and the criminal may discuss the crime without restraint...." *In the Matter of Children of Bedford, Inc. v. Petromelis,* ____ N.Y. 2d ____ (1991) (Slip opinion at 14).

The appropriate test by which to judge the constitutionality of the statute was set forth in *United States v. O'Brien,* 391 U.S. 367 (1968), where the Court considered the First Amendment ramifications of a statute which imposed criminal sanctions on one who knowingly destroyed his draft card. As this Court noted in *O'Brien:*

> [W]e think it is clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that issue.

Id. at 377.

This test was subsequently noted in *Arcara v. Cloud Books, Inc., supra,* where the Court upheld the closure of a bookstore in which prostitution and other unlawful conduct

were occurring. The Court, in considering the *O'Brien* test, indicated that the legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity. In response to the argument that the effect of the statutory closure remedy impermissibly burdened its First Amendment protected book-selling activities, the Court indicated that the severity of that burden was dubious at best and was mitigated by the fact that the owners remained free to sell the same materials at another location. *Id.* at 707.\

Petitioner, a publishing company, argues that the removal of the profit incentive will reduce the number of stories generated by criminals. Not only is there a lack of credible evidence demonstrating a reduction of "willing speakers," but that argument ignores many alternative means that are available to the media to procure the necessary information. On numerous occasions, this Court has held that the First Amendment does not guarantee the press an unrestrained right of access to news sources or to gather information. *Pell v. Procunier,* 417 U.S. 817 (1974), and *Houchins v. K.Q.E.D., Inc.,* 438 U.S. 1 (1977) (affirming restricted access to prisons for the purpose of conducting inmate interviews).

Information concerning criminals and their exploits can be obtained by alternate methods. An industrious investigative reporter could obtain substantially the same results by interviewing public officials, private citizens or witnesses, and by reviewing police reports, court records and courtroom testimony. Additionally, as previously noted, in many instances the criminal will willingly forego the receipt of profits and will tell his story to satisfy some other motive or emotional need. Of course, if the criminal is willing to speak, the statute does not prevent him from telling his story. Simply stated, a publisher does not have an unfettered First Amendment right of access to all information sources. If the publisher deems it expedient to contract with a criminal to

exploit his crime, then the involuntary victim should be the third-party beneficiary. This is what the statute accomplishes. Therefore, when balancing the rights of the victim against those of the criminal and a publisher, the insubstantial burden arising from the Son-of-Sam law should be subject to the test enumerated in *United States v. O'Brien, supra.*

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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